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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-004586 12/28/2018

HON. TERESA SANDERS

CLERK OF THE COURT
A. Durda
Deputy

SAHAK RZIAN NEAL G HORENSTEIN

v.

MAHA ABOU-ARRAJE, et al. ANTHONY GUY SALVADOR

JUDGE SANDERS

RULING

The Court has read and considered Plaintiff's *Amended Partial Motion for Summary Judgment Regarding Enforceability of Lease Agreement and Option to Buy Clause* filed July 31, 2018, Defendants' response filed October 5, 2018, and Plaintiff's reply filed October 25, 2018, as well as the accompanying Statement of Facts for each. The Court has also considered the authorities cited by counsel, and the arguments of counsel made on December 13, 2018.

In his First Amended Complaint, filed May 30, 2018, Plaintiff seeks judgment against Defendants, for Specific Performance, Breach of Contract, Breach of Good Faith and Fair Dealing, Negligent Misrepresentation, Fraud, and Unjust Enrichment in connection with a written contract, entitled "Commercial Net Lease for Part of Building" entered into between Plaintiff and Defendant Maha Abou-Arraje on or about May 12, 2011.

The agreement sets forth a paragraph entitled "6 A. Option to Buy", which provides as follows:

> "After 5 year lease (January 2017) Tenant has the option to buy the property, all monies paid for term of lease shall be considered as down payment for above mentioned premises. The difference for monies paid, and fair market value for that time (January 2017) shall be paid monthly for a term of 5 years ending January 2021, by Shak Rzian to Maha Abou-Arraje without interest, with Maha Abou-Arraje being the lean holder."

On August 3, 2016, in a different cause number, Plaintiff sued Defendants to enforce this provision of the agreement. Defendants successfully litigated a motion to dismiss pursuant to Rule 12(b)(6), contending that the controversy was not ripe for litigation because Plaintiff filed the lawsuit prior to January 1, 2017. In the motion, which was filed on behalf of **both** Defendants, they argued as follows:

> "The parties do not dispute the existence of the Lease, the validity of the Lease, or, most critically, the term of the Lease, which ends on January 1, 2017.
>
> The parties also do not dispute the provisions under the Lease, which include, at Page 2, Paragraph 6 the following:
>
> > After 5 year lease (***January 2017***) Tenant has the option to buy the property, all monies paid for term of lease shall be considered as down payment for above-mentioned premises. The difference for monies paid, and fair market value for that time (***January 2017***) shall be paid monthly for a term of 5 years ending January 2021, by Shak Rzian to Maha Abou-Arraje (sic) without interest, with Maha Abou-Arraje (sic)being the lean holder."

Defendants then went on to argue, in their motion to dismiss, that based upon the written agreement, Plaintiff did "not have the contractual right to ***begin to buy, at then controlling market rates*** – until January, 2017". Defendants finally contended that "the purchase option clause is not ripe for adjudication", because it "does not mature and become exercisable until January 2017". As noted above, Defendants' motion to dismiss was successful, and Plaintiff's complaint was dismissed without prejudice, on ripeness grounds, on or about October 12, 2016.

Plaintiff thereafter filed this lawsuit seeking to exercise the "option to buy" clause set forth above. In their Answer, Defendants claim the "option to buy" clause, as set forth in the

parties' written agreement, is void pursuant to the statute of frauds because it was not executed by Defendant Simone Abou-Arraje, a co-owner of the subject real property.

Plaintiff filed the pending motion, and alleges that he is entitled to summary judgment on the issue of the enforceability of the "option to buy" clause pursuant to collateral estoppel. After Defendants' response claimed Plaintiff failed to establish the necessary elements of collateral estoppel, Plaintiff further urged judicial estoppel in support of his motion.

Pursuant to Ariz. R. Civ. P. Rule 56(a), "[t]he court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Evidence is viewed in the light most favorable to the nonmoving party. *Sanchez v. City of Tucson*, 191 Ariz. 128, 953 P.2d 168 (1998). "It is only the existence of uncontroverted competent evidence favorable to a movant, from which only one inference can be drawn, that entitles a party to summary judgment." *Nemec v. Rollo*, 114 Ariz. 589, 592, 562 Pl.2d 1087, 1090 (App. 1977) (citing *Choisser v. State ex rel. Herman*, 12 Ariz.App. 259, 469 P.2d 493 (1970)).

"When deciding a motion for summary judgment, '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, 444, ¶ 19, 153 P.3d 1069, 1073 (App. 2007) (quoting *Thomspon v. Better-Bilt Aluminum Prds. Co*., 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992)). "Summary judgment is inappropriate where the facts, even if undisputed, would allow reasonable minds to differ." *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 191, 888 P.2d 1375, 1378 (App. 1994).

"Collateral estoppel, or issue preclusion, binds a party to a decision on an issue litigated in a previous lawsuit if the following factors are satisfied: (1) the issue was actually litigated in the previous proceeding, (2) the parties had a full and fair opportunity and motive to litigate the issue, (3) a valid and final decision on the merits was entered, (4) resolution of the issue was essential to the decision, and (5) there is common identity of the parties." *Campbell v. SZL Props., Ltd*., 204 Ariz. 221, 223 (App. 2003). Common identity of the parties is not necessary if collateral estoppel is invoked defensively to prevent a plaintiff from re-litigating an issue the plaintiff previously litigated unsuccessfully against another party. *Id.*

In our case, the Court finds that Plaintiff has failed to establish all of the elements for a finding of collateral estoppel. In particular, the Court finds that the issue regarding the applicability of the statute of frauds was not litigated in the prior proceeding, nor was a "valid and final decision on the merits" entered.

The doctrine of judicial estoppel requires different elements, and is based upon the premise that "[A] party who has assumed a particular position in one judicial proceeding will not be allowed to assume an inconsistent position in a subsequent proceeding." *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 483 (1977).

Judicial estoppel will only apply if three requirements are met: "(1) the parties must be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding." *Bank of Am. Nat. Trust & Sav. Ass'n v. Maricopa Cty.*, 196 Ariz. 173, 175 (App. 1999) (citation omitted).

In our case, Defendants, in a prior proceeding, claimed that "the parties do not dispute the existence of the Lease, the validity of the Lease, or, most critically, the term of the Lease, which ends on January 1, 2017." They further used the precise clause of the written agreement at issue here, the "option-to-buy" clause, which they also agreed they "do not dispute the provisions" of, to support their argument that Plaintiff could not exercise that option until January 1, 2017. They now argue that it is void because it violates the statue of frauds.

With regard to the elements of judicial estoppel, the Court finds as follows:

(1) The parties are the same. Plaintiff and each Defendant were parties to both legal proceedings.

(2) The provisions of the written agreement, and in particular the "option to buy" clause were at issue in both legal proceedings. In the prior legal proceeding, Defendants utilized the provision to support their argument that the option could not be exercised until January 1, 2017. In the pending proceeding, Plaintiff is utilizing the provision to exercise his option now that it is available. However, the issue regarding whether the provision violates the statute of frauds was not addressed in the prior proceeding.

(3) Defendants were successful in obtaining a dismissal of the prior proceeding because they argued, pursuant to the written terms of the "option to buy" clause, that it was not yet available to Plaintiff to exercise. The judge in the prior proceedings agreed, and found that Plaintiff's "option to buy" pursuant to the terms of the parties' written agreement was not ripe for adjudication, and dismissed the matter without prejudice. The issue of whether or not the

> "option to buy" provision violated the statute of frauds because it was not signed by both Defendants was not litigated in the prior proceeding.

Because the precise issue here is whether or not the lack of both Defendants' signatures on the written agreement violates the statute of frauds, and that issue was not previously addressed in the prior proceeding, the Court finds that Plaintiff has failed to establish all necessary elements of judicial estoppel.

For the reasons set forth above, it is ordered denying Plaintiff's *Amended Partial Motion for Summary Judgment Regarding Enforceability of Lease Agreement and Option to Buy Clause* filed July 31, 2018.